No. 17-340

In The

Supreme Court of The United States

New Prime, Inc.,

Petitioner,

v.

Dominic Oliveira,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR CUSTOMIZED LOGISTICS AND DELIVERY ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF PETITIONER.

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TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

I. INTEREST OF THE AMICUS CURIAE 1

II. INTRODUCTION AND SUMMARY OF ARGUMENT 3

III. ARGUMENT 6

A. THE FEDERAL POLICY FAVORING ARBITRATION WAS DEVELOPED TO ENSURE PARTIES TO A CONTRACT HAVE ACCESS TO EFFICIENT DISPUTE RESOLUTION 6

1. ARBITRATION IS A COST-EFFECTIVE AND EFFICIENT ALTERNATIVE TO LITIGATION 8

2. ARBITRATION PROVIDES BOTH PARTIES WITH A FAIR OPPORTUNITY TO HAVE THEIR DAY IN COURT 12

B. COURTS SHOULD NOT LOOK BEYOND THE TERMS OF THE CONTRACT TO DETERMINE WHETHER IT FALLS WITHIN THE SECTION 1 EXCLUSION 15

IV. CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995).....5

AT & T Techs., Inc. v. Commc'ns Workers of Am.,
475 U.S. 643 (1986).....17

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011).....*passim*

Aviles v. Quik Pick Express, LLC,
2015 WL 5601824 (C.D. Cal. Sept. 23, 2015).....4

Carney v. JNJ Exp., Inc.,
10 F. Supp. 3d 848 (W.D. Tenn. 2014).....4

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001).....3, 9, 11

Davis v. Larson Moving & Storage Co.,
2008 WL 4755835 (D. Minn. Oct. 27, 2008).....4

Diaz v. Mich. Logistics, Inc.,
2016 WL 866330 (E.D.N.Y. Mar. 1, 2016).....4

Doe v. Swift Transp. Co.,
2015 WL 274092 (D. Ariz. Jan. 22, 2015).....4

Morning Star Assocs., Inc. v. Unishippers Global Logistics, LLC,
2015 WL 2408477 (S.D. Ga. May 20, 2015) 4

N.L.R.B. v. United Ins. Co. of Am.,
390 U.S. 254 (1968) 18

Owner-Operator Indep. Drivers Ass'n v. United Van Lines, LLC,
2006 WL 5003366 (E.D. Mo. Nov. 15, 2006) 4

Port Drivers Fed. 18, Inc. v. All Saints,
757 F. Supp. 2d 463 (D.N.J. 2011) 4

Roadway Package Sys., Inc. v. Kayser,
1999 WL 817724 (E.D. Pa. Oct. 13, 1999) 4

Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) 9

In re Swift Transp. Co.,
830 F.3d 913 (9th Cir. 2016) 4, 16, 18

Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc.,
423 U.S. 28 (1975) 8

Federal Statutes

9 U.S.C. §§ 1, 2 3

Federal Arbitration Act ..... *passim*

Federal Arbitration Act § 1 ..... *passim*

Rules

U.S.C Rule 37.6 1

Other Authorities

Civil Justice, *Business to Business Arbitration in the United States, Perceptions of Corporate Counsel* 30 (2011) 12

Forbes (Jul. 14, 2009), https://www.forbes.com/2009/07/14/lipner-arbitration-litigation-intelligent-investing-cost.html#15043f174ed1 11

H.R.Rep. No. 97-542, p. 13 (1982) 9, 10

Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* 24 (2005) 14

John Barkai, Elizabeth Kent, and Pamela Martin, *A Profile of Settlement* 14

Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998) 13

Martha Halvordson, *Employment Arbitration: A Closer Look* 12

Michael Delikat and Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?* 13

Roy Weinstein, Cullen Edes, Joe Hale and Nels Pearsall, Micronomic Research and Consulting, *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings* 14 (2017).....10

Seth Lipner, *Is Arbitration Really Cheaper?* 11

Theodore Eisenberg and Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison* 13

I. INTEREST OF THE AMICUS CURIAE[1]

CLDA is a non-profit trade association that advances the interests of the customized logistics and delivery industry through advocacy, networking and education. CLDA's membership includes over 300 first, middle and last mile delivery carriers, and over 3,500 driver members. CLDA's members are the people who transport packages, medical supplies, bulk materials, documents, general freight, and other goods to the home, office and everywhere in between. CLDA members widely use independent owner-operators as a vital component of their business model – either solely or in conjunction with dedicated employee drivers.

This case is of significant interest to CLDA because of the common industry practice of utilizing independent owner-operators to transport cargo. These independent owner-operators are crucial to the structure of many of the carriers' businesses, as they often provide the equipment and services carriers need to meet the changing demands of their businesses. Further, these carriers frequently rely on arbitration provisions in their

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[1] After timely notification, petitioner and respondent consented to the filing of this brief.
Pursuant to Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus, its members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

contracts with owner-operators to ensure that both parties have an efficient and cost-effective means through which they can resolve their disputes. The decision below, which applied an overly expansive interpretation of the exception to the Federal Arbitration Act ("FAA"), would render these arbitration agreements unenforceable. That would leave both the carriers and owner-operators subject to the threat of lengthy and costly litigation.

Indeed, without the option of arbitration, the burden of protracted litigation would be too great for many of CLDA's members. The largest segment of CLDA's membership consists of small operators with between one and fifty drivers, and annual revenues of less than one million dollars. Arbitration provides these small businesses a forum in which they can fairly, and affordably, resolve disputes between themselves and the other businesses with which they contract. These businesses do not have the resources to carry on lengthy and expensive lawsuits in civil court, and will often be forced to settle their disputes, regardless of the merits of the case, to avoid protracted litigation.

Further, many of CLDA's members are the owner-operators themselves, who also rely on the protections of arbitration provisions contained within their independent contractor agreements. Like carriers with which they contract, these owner-operators benefit from an efficient, streamlined dispute resolution process.

These CLDA members have relied on the precedent of this Court strongly favoring arbitration, and the decisions from other circuits, which have interpreted the exception to the FAA to be inapplicable to independent contractor agreements. If the benefit of the FAA is denied these members, many will face the threat of expensive and protracted class action litigation. For these small businesses, a class action in state or federal court forces them either to settle out of fear or "bet the company" on ruinous litigation. The option of arbitration gives them a third option: quicker and less costly resolution of disputes.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the FAA in response to "widespread judicial hostility" towards the enforcement of arbitration agreements, and it reflects a "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Consistent with this policy, the FAA broadly governs any "contract evidencing a transaction involving commerce," subject to a single exception in Section 1 of the Act carving out "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §§ 1, 2. And as this Court has declared, even this exception must be given "a narrow construction" in light of the FAA's pro-arbitration purpose. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001).

Applying this logic to the plain language of the FAA, federal courts in various circuits have traditionally held that the Section 1 exception only carves out contracts between employers in the transportation industry and their employees, and not agreements with independent contractors. *See, e.g., In re Swift Transp. Co.*, 830 F.3d 913 (9th Cir. 2016)("*Van Dusen III*"); *Doe v. Swift Transp. Co.*, 2015 WL 274092, at *3 (D. Ariz. Jan. 22, 2015); *Aviles v. Quik Pick Express, LLC*, 2015 WL 5601824, at *6 (C.D. Cal. Sept. 23, 2015); *Diaz v. Mich. Logistics, Inc.*, 2016 WL 866330, at *4 (E.D.N.Y. Mar. 1, 2016); *Morning Star Assocs., Inc. v. Unishippers Global Logistics, LLC*, 2015 WL 2408477, at *5 (S.D. Ga. May 20, 2015); *Carney v. JNJ Exp., Inc.*, 10 F. Supp. 3d 848, 852 (W.D. Tenn. 2014); *Port Drivers Fed. 18, Inc. v. All Saints*, 757 F. Supp. 2d 463 (D.N.J. 2011); *Davis v. Larson Moving & Storage Co.*, 2008 WL 4755835, at *4 (D. Minn. Oct. 27, 2008); *Owner-Operator Indep. Drivers Ass'n v. United Van Lines, LLC*, 2006 WL 5003366, at *3 (E.D. Mo. Nov. 15, 2006); *Roadway Package Sys., Inc. v. Kayser*, 1999 WL 817724, at *4 n.4 (E.D. Pa. Oct. 13, 1999). The First Circuit is now a lone outlier on the scope of the Section 1 exemption.

The decision below not only conflicts with the holdings of other federal courts, it directly conflicts with the central goal of the FAA: to ensure that arbitration agreements between contracting parties are enforceable by the parties, thereby safeguarding each party's access to an efficient and cost-effective alternative to litigation. Indeed, as this Court has recognized, "[t]he FAA's overarching purpose is to ensure the enforcement of arbitration agreements

according to their terms so as to facilitate informal, streamlined proceedings." *AT&T Mobility LLC*, 563 U.S. at 334 (2011). The First Circuit's expansive interpretation of the Section 1 exclusion would nullify arbitration agreements between delivery carriers and the independent contractors they rely upon. This would undermine the federal policy favoring arbitration, and unfairly deprive both groups of the FAA's assurance that they will have access to an informal and streamlined process.

As this Court has recognized, arbitration provides several distinct and important advantages over litigation, including an expedited process, cost-efficiency, informality, and confidentiality. These advantages are crucial in preserving the resources of the parties who have entered into arbitration agreements, in particular the smaller businesses and owner-operators who lack the resources to survive protracted litigation, especially class actions. The importance of arbitration to these groups cannot be overstated. As this Court has observed, "arbitration's advantages often would seem helpful to individuals . . . who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

Additionally, there is no public policy interest that would be served by the First Circuit's expansive interpretation of the Section 1 exclusion. Arbitration has proven to be a fair and equitable alternative to court litigation. Claimants succeed in arbitration at roughly the same rate as plaintiffs in court. Further, the amounts of the awards recovered in arbitration are comparable to those recovered by

successful plaintiffs following a jury trial. It is also important to note that in arbitration, both parties are more likely to have their "day in court," as opposed to litigation, where employment cases rarely make it to trial.

Finally, as Petitioner forcefully argues in its Brief, CLDA agrees that courts should not look beyond the terms of a contract to determine whether it is a "contract of employment" within the meaning of the Section 1 exception. Doing otherwise, such as by conducting mini-trials to determine the legal relationship between the parties, would contravene the plain language of the FAA, which singularly focuses on the nature of the parties' contract, not the nuances of the relationship between the parties. Moreover, looking beyond the four corners of the agreement would force the parties to litigate their dispute (and often decide the ultimate question at issue – the plaintiff's legal status) even before they reach the arbitral forum. This would frustrate the purpose of the FAA, and cut against the federal policy favoring arbitration.

III. ARGUMENT

A. The Federal Policy Favoring Arbitration Was Developed to Ensure Parties to a Contract Have Access to Efficient Dispute Resolution

If affirmed, the First Circuit's expansive interpretation of the Section 1 exclusion would strip carriers and owner-operators of the FAA's assurance that their otherwise valid arbitration agreements

will be enforced. This would seriously undermine the Congressional policy favoring arbitration by carving out from the coverage of the FAA a vast swath of business to business contracts having nothing to do with "employment" relationships – as the term is universally understood – of any kind. Motor carriers of all kinds, including many owner-operators and other small transportation businesses, will no longer be able to count on arbitration as a lower-cost, more efficient alternative to litigation. As a consequence, rather than preventing the disruption of the flow of goods in interstate commerce (Section 1's surmised purpose), the exclusion will leave these parties facing the specter of protracted and expensive litigation, which is guaranteed to disrupt – and sometimes end – their entire operations.

The Section 1 exclusion to the FAA was not intended to restrict the ability of two independent businesses to adopt an inexpensive dispute resolution alternative to litigation. Contracts between business operators are entirely different than employer-employee relationships. Generally, an employer holds greater bargaining power than an employee. In the motor carrier context, contracts are between parties that are not dependent on one another. When two such business operators enter into a contract, they are on equal footing. As this Court has noted:

> "Demand for a motor carrier's services may fluctuate seasonally or day by day. Keeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and idleness, are

> necessary and continuing objectives. It is natural, therefore, that a carrier that finds itself short of equipment necessary to meet an immediate demand will seek the use of a vehicle not then required by another carrier for its operations, and the latter will be pleased to accommodate. *Each is thereby advantaged.*"

Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc., 423 U.S. 28 (1975)(emphasis added). It is difficult to imagine that the Section 1 exclusion was included to restrict two independent businesses, which signed a contract at arms-length. This would severely frustrate the liberal policy favoring arbitration.

Transportation businesses, including carriers and those with which they contract as independent contractors, should therefore be entitled to avoid the burdens of litigation by mutually agreeing to arbitrate disputes. Holding otherwise would achieve no benefit and, instead, undermine the FAA's very purpose "to facilitate informal, streamlined proceedings," *AT&T Mobility LLC*, 563 U.S. at 334 (2011).

1. Arbitration Is a Cost-Effective and Efficient Alternative to Litigation

The trucking industry is a competitive market for both carriers and owner-operators. Every business must operate on slim margins to keep prices reasonable. This atmosphere requires trucking firms, big or small, to operate in the most efficient

manner possible. Arbitration is a key tool used by many transportation businesses to achieve this goal. Arbitration provides carriers and owner-operators alike with a cost-effective, efficient forum for dispute resolution, allowing them to avoid the lengthy and expensive burdens of litigation. It is precisely these advantages that Congress sought to promote in adopting the FAA. "The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings." *AT&T Mobility LLC*, 563 U.S. at 334 (2011).

Congress has recognized the efficiencies and advantages of arbitration:

> "The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices ..."

H.R.Rep. No. 97-542, p. 13 (1982). This Court has echoed the sentiments of Congress in recognizing the value of arbitration in several of its decisions. *See Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)("parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"); *Circuit City*, 532 U.S. at 107

(2001)("there are real benefits to arbitration in the employment context, including avoidance of litigation costs.")

With respect to the total length of time to complete the process, the value of arbitration has been clearly demonstrated. In the context of claims arising from employment disputes, an average arbitration moves through final hearing more than a year faster than a case litigated in court. Arbitration is nearly two years faster when there is an appeal. Roy Weinstein, Cullen Edes, Joe Hale and Nels Pearsall, Micronomic Research and Consulting, *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings* 14 (2017)(finding that the median time for cases to make it through trial in U.S. District Courts was 24.2 months and the median time to complete arbitration was just 11.6 months).

Delays in dispute resolution force litigants to set aside resources: 1) in anticipation of the costs of litigation, and 2) to budget for a possible award. The uncertainty and longer duration of the court litigation process makes it difficult to estimate the total costs, making litigants less willing to take the risk. This is particularly harmful to small businesses, which have limited resources, and may be unable, or unwilling, to expand their businesses until the cloud of litigation passes. It is estimated that lost opportunity costs for companies are over $2 billion dollars per year when companies are exposed to court litigation compared to arbitration. *Id.* at 18.

The direct costs of litigation are even more staggering. The initial filing fees for arbitration admittedly can equal or exceed the costs of filing a case in court. After that, though, the costs of court litigation quickly outstrip arbitration, once attorney's fees, the costs of discovery, payment of court reporters and expert witnesses begin to mount. Seth Lipner, *Is Arbitration Really Cheaper?*, Forbes (Jul. 14, 2009), https://www.forbes.com/2009/07/14/lipner-arbitration-litigation-intelligent-investing-cost.html#15043f174ed1. It is estimated that the average cost of litigation is *three to four times higher* than the cost of arbitration. Nat'l Arbitration Forum, Business-to-Business Mediation/Arbitration vs. Litigation 2 (2005).

Given the high costs of litigation, all parties to an arbitration agreement benefit from the availability of a cheaper alternate forum. If a dispute arises involving a small sum of money, the aggrieved party may be hesitant to attempt to recover the disputed sum when faced with the hurdles and costs of litigation. However, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance [when a case] involves smaller sums of money." *Circuit City*. 532 U.S. at 123 (2001).

Perhaps the biggest advantage of arbitration is the unpredictability of jury verdicts in business-related disputes. Indeed, the factor that most motivates small businesses to choose arbitration is the fear of an excessive or emotionally driven jury award that may include large awards for punitive

damages and emotional distress. *See* Rand Institute for Civil Justice, *Business to Business Arbitration in the United States, Perceptions of Corporate Counsel* ("Rand") 30 (2011)(finding that seventy-five percent of people consider the threat of an excessive jury award as an important factor that favors arbitration). The unpredictability of jury awards, and the fear that a jury may award excessive damages, often forces small businesses into pretrial settlement. Martha Halvordson, *Employment Arbitration: A Closer Look*, 64 J. Mo. B. 174, 178 (2008).

For motor carriers and owner-operators, speed of resolution and preservation of financial resources are vital business considerations. Arbitration provides motor carriers and owner-operators a forum in which they can resolve their disputes with less disruption – both in time and money – to their respective businesses. This is especially important to small carriers and independent owner-operators, for whom many disputes involve a small sum of money. The fundamental purpose of the FAA is to provide an alternative forum in which the drawbacks of litigation – delay and cost – can be minimized.

2. Arbitration Provides Both Parties with a Fair Opportunity to Have Their Day in Court

While the efficiency and cost-effectiveness of arbitration may be its most apparent advantages, arbitration also provides both parties with a greater opportunity to have their "day in court." No party is at a disadvantage in arbitration, and both parties

reap the benefits of an expedited, efficient process.

It is a common misconception that claimants are disadvantaged in arbitration proceedings. Several studies have demonstrated that claimants in employment disputes succeed on their claims in arbitration at least as often as plaintiffs succeed at trial. *See* Michael Delikat and Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, Disp. Resol. J., November 2003-January 2004, at 58 (finding that claimants in arbitration win at a rate of forty-six percent of the time compared to plaintiffs in federal court who won only in thirty-four percent of cases); Theodore Eisenberg and Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J., Nov 2003-Jan 2004 at 44 (finding "no statistically significant differences between employee win rates" in cases in arbitration compared to cases that are litigated in court); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998)(claimants won in sixty-three percent of claims that were arbitrated).

Studies further demonstrate that successful claimants in arbitration fare as well as successful plaintiffs in Court litigation when it comes to recovery. In fact, the median awards for claimants in arbitration arising out of employment disputes have been shown to be equal to, or higher than, the median jury award in court. *Id.* at 50 (median award in non-civil-rights employment disputes of $95,000 was higher than the median award of

$69,000 in court cases); Delikat and Kleiner, *supra*, at 58 ("[w]hen a claimant does get to have a trial, we found that the median monetary recovery is fairly comparable to the amount received in arbitration").

Claimants enjoy win rates and awards in arbitration that are comparable to those they could anticipate in court. At the same time, they get quicker results at less cost. Thus, it is unsurprising that a high number of participants in arbitration have expressed satisfaction with the fairness of the process and outcome. *See* Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* 24 (2005) (finding that seventy-five percent of participants in arbitration were satisfied with the fairness of the process compared to twenty percent who were not satisfied).

In addition to comparable – if not better – outcomes for claimants, arbitration is also more likely to provide the parties their "day in court." The long process of litigation is expensive and contains many obstacles. This prevents the large majority of cases from ever reaching trial. Indeed, less than three percent of civil cases are tried, and less than one percent of civil case dispositions are jury trials. John Barkai, Elizabeth Kent, and Pamela Martin, *A Profile of Settlement*, 42 Court Review: The Journal of the American Judges Association 34 (2006). There are a number of plausible explanations for this. As discussed above, the high costs of litigation (and/or the attendant harmful publicity) may force a party into a settlement, without having an opportunity to be heard. Alternatively, a court may end the litigation on a party's dispositive motion, such as a

motion for summary judgment, which is generally not available in arbitration. In arbitration, however, about one-third of cases reach a final hearing. *See* Eisenberg and Hill, *supra*, at 52. (showing that roughly one-third of employment arbitrations filed reached a final award). Arbitration provides parties with a greater opportunity to get a actual decision resolving their dispute.

Ultimately, arbitration has continued to grow as an alternative to litigation because it works. Neither party is at a disadvantage in arbitration, as demonstrated by the comparable success rates and monetary awards between claimants in arbitration and plaintiffs in court. Further, both parties have an opportunity to be heard on the merits, rather than settling out of fear, or declining to even bring an action because the intimidating nature of the litigation process outweighs the value of the potential award.

B. Courts Should Not Look Beyond the Terms of the Contract to Determine Whether It Falls Within the Section 1 Exclusion

As noted above, the benefits that arbitration provides to motor carriers and owner-operators can be crucial to the continued viability of their businesses. But for any party to reap the benefits of an agreement to arbitrate, it must: 1) have confidence the contract will be enforced, and 2) not be required to drain resources litigating the merits of its case before even reaching the arbitral forum.

In order to achieve these goals, the determination of "whether a contract qualifies as a 'contract of employment'" within the meaning of Section 1 of the FAA "requires a categorical approach that focuses solely on the words of the contract." *In re Swift Transportation Co. Inc.*, 830 F.3d 913, 920 (9th Cir. 2016)(Ikuta, J., dissenting). Courts should not be allowed to make factual determinations regarding the employment relationship of the contracting parties for two reasons. First, to do so deprives the parties of the benefits of arbitration by forcing the parties to expend valuable resources in a preliminary court battle. Second, a threshold factual determination means that the parties must essentially litigate the merits of the case. This in turn creates uncertainty as to the enforceability of the contract at execution.

If a court looks beyond the terms of the contract to determine if an employment relationship exists under law (not under the contract), the court will have to make factual determinations. This could potentially require extensive discovery including depositions, productions of documents, testimony of witnesses, hearings, etc. Forcing parties to expend resources to engage in this type of litigation undermines the purpose of the FAA, which is to to "facilitate informal, streamlined proceedings." *AT&T Mobility LLC*, 563 U.S. at 334 (2011). By requiring the parties to litigate their dispute, at the outset, the carriers and owner-operators are robbed of the cost and efficiency benefits that they hoped to achieve through arbitration.

This would also lead to inconsistency. Once a court chooses to look beyond the terms of the contract, it is unclear how far the court should go. One court may decide the issue solely on a review of all business documents. A second court might require sworn declarations from the parties. And a third court could order discovery, followed by live testimony (essentially, a mini-trial on the ultimate issue to be decided in the case). None of this is consistent with the purposes of the FAA. By requiring that courts look only to the terms of the contract, this Court would establish uniformity. Trial courts would then focus on the nature of the contract and credit the intent of the parties, as memorialized in the written agreement.

It has long been the rule of this Court that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). The reasoning behind this rule is to respect the agreement of the parties to have the arbitrator decide the ultimate issue. *Id.* In a misclassification suit, it is often the case that the key issue – if not the only issue – to be resolved is the nature of the parties relationship (i.e., employment or independent contractor). Deciding this question at the outset of a case, even if only for a limited purpose or under a slightly different legal standard, greatly infringes on the parties' right to have an arbitrator decide the issue, and to do so against a clean tableau untainted by a court's findings on a limited record prior to full discovery. Indeed, "by requiring the parties to litigate the

underlying substance" of their claims the "court risks depriving [the parties] of the benefits of [their] contract." *In re Swift Transportation Co. Inc.*, 830 F.3d at 920 (Ikuta, J., dissenting).

Additionally, many misclassification cases present factual scenarios "where it is difficult to determine whether a party is an employee or an independent contractor." *N.L.R.B. v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968). This difficulty would inevitably lead to unpredictable and inconsistent outcomes if courts are required to resolve the questions on limited evidence. Even cases involving the same contracts and similar facts could result in different outcomes. In contrast, if courts do not look beyond the four corners of the contract, the parties could reasonably anticipate the outcome, and take steps to ensure that they have an enforceable contract at the time the contract is executed.

In order to provide the carriers and owner-operators a level of certainty that their contract will be enforced, as well as to ensure that the parties are able to enjoy the benefits of arbitration, "contracts of employment" must only be determined by the terms of the contract.

IV. CONCLUSION

The issue presented here is of grave concern to the carriers and owner-operators who comprise the CLDA. For the foregoing reasons, and those stated in the Petitioner's brief, the judgment of the Court of Appeals should be reversed.

Respectfully Submitted,

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